Nos. 86-1784 and 86-1785

In the Supreme Court of the United States

OCTOBER TERM, 1987

SANFORD COHL AND CHARLES GREGORY, SR.,
PETITIONERS

v.

UNITED STATES OF AMERICA

MICHAEL COHL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government's delayed disclosure of alleged *Brady* material entitles petitioners to a new trial.

2. Whether the district court properly vacated its sua sponte order granting petitioners a new trial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and rule:

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OPINION BELOW

The opinion of the court of appeals (Pet. App. D1-D3)[1] is reported at 812 F.2d 1408 (Table).

[1] "Pet. App." refers to the appendix to the petition for a writ or certiorari in No. 86-1784.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1987. A petition for rehearing was denied on March 6, 1987 (Pet. App. E1). The petition for a writ of certiorari in No. 86-1784 was filed on May 4, 1987, and the petition in No. 86-1785 was filed on May 5, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioners Michael Cohl and Charles Gregory, Sr., were convicted on 14 counts of interstate transportation of stolen property, in violation of 18 U.S.C. 2314. Petitioner Sanford Cohl was convicted on two counts of that offense. Each petitioner was also convicted of conspiracy, in violation of 18 U.S.C. 371. Michael Cohl was sentenced to concurrent four-year terms of imprisonment on each count, and Gregory and Sanford Cohl were sentenced to concurrent three-year terms of imprisonment on each count. In addition, Michael and Sanford Cohl were each fined a total of $30,000, and Gregory was fined $10,000. The court of appeals affirmed in a per curiam opinion (Pet. App. D1-D3).

1. The evidence at trial showed that petitioners owned and operated SMC Hauling Company. On October 9, 1978, SMC entered into a contract with Jones & Laughlin Steel Corporation whereby SMC agreed to haul away slag from Jones & Laughlin's steel mill. In return, SMC was entitled to remove stainless steel from the slag and to sell it, subject to Jones & Laughlin's right of first refusal (2 Tr. 198-203). Under

the contract, stainless steel ingot "butts"—residual metal from partially filled ingot molds—were not to be removed from the plant. Stainless steel "caps"—residual metal recovered from the molten slag—could be removed if they were not first picked out by designated Jones & Laughlin employees, who received incentive pay to recover steel from the slag (2 Tr. 77; 3 Tr. 22-23; 7 Tr. 65). Large caps, which were almost as valuable as ingot butts and which could be easily seen in and picked from the slag, were expected to be reclaimed by the Jones & Laughlin employees, not by SMC (2 Tr. 86, 116, 202-208; 3 Tr. 19, 22-23, 50).

From late 1977 to 1982, SMC made payments to various Jones & Laughlin employees who, in turn, left butts and large caps in the slag for SMC to remove (*e.g.*, 3 Tr. 116-120; 4 Tr. 106-108, 110-117, 119-120, 128; 7 Tr. 74-77). To conceal the resulting thefts, SMC offered few, if any, of the large pieces of steel for sale to Jones & Laughlin, despite the latter's right of first refusal under the contract (2 Tr. 86; 4 Tr. 252-253; 8 Tr. 133-134). Instead, petitioners sold the stolen ingot butts and large caps to out-of-state companies through other companies owned by petitioners (6 Tr. 41-43, 65-83; 7 Tr. 10, 12, 22, 25; GXs 2-6, 8-16, 25-27, 33-37, 39-45).

2. At trial, the government elicited testimony from Norman Reese, the SMC foreman who had supervised the various interstate shipments of stolen property, to establish that each shipment had a value in excess of $5,000, as is required by 18 U.S.C. 2314. Reese correlated the weight of each shipment of stainless steel, as set forth in the invoice, with its contents (6 Tr. 66-92). He stated that one shipment could have

been "butt ends, a few small caps" (*id.* at 67), and he described the remaining shipments as butt ends, ingots, or both (*id.* at 68-92). On cross-examination, Reese described the shipments as mainly 2,000 to 4,000 pound butt ends (*id.* at 178-192). He further testified that SMC did not ship caps mixed with butt ends (*id.* at 178-179).

On the third day of jury deliberations, the jury asked a question that prompted a meeting of the parties. During an off-the-record conversation with defense counsel, the prosecutor mentioned that Reese previously had indicated that some of the shipments contained caps. Defense counsel took no action in response to that disclosure, and the jury returned its verdicts shortly thereafter. Two weeks later, on June 19, 1985, petitioners moved for a new trial under Fed. R. Crim. P. 33 on the ground that the government had failed to disclose Reese's allegedly inconsistent prior statement (86-1784 Pet. 5). See *Brady* v. *Maryland*, 373 U.S. 83 (1963). The district court denied that motion on July 23, 1985, concluding that "there is no reasonable probability that the questioned non-disclosed evidence would have affected the outcome of the trial" (Pet. App. A1).

Seventeen days later, on August 8, 1985, the court reconvened the parties and announced that it had determined, sua sponte, to reconsider its order. The court granted petitioners a new trial, apparently believing that this Court's recent decision in *United States* v. *Bagley*, 473 U.S. 667 (1985), required that result. See Pet. App. C1.[2] Thereafter, the gov-

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[2] In *Bagley*, this Court held that a prosecutor's failure to disclose *Brady* material does not require a new trial unless the evidence is material (473 U.S. at 678-679). The Court

ernment moved for reconsideration of the court's decision, arguing that the court lacked jurisdiction to order a new trial sua sponte. The district court agreed and vacated its order (Pet. App. C1-C4).

3. On appeal, petitioners argued that the government's failure to furnish them with Reese's prior statement entitled them to a new trial. They also argued that the district court erred in vacating its sua sponte order granting a new trial. The court of appeals rejected the *Brady* claim, concluding that petitioners had "failed to demonstrate either the error they seek to raise, or the materiality of, or prejudice from, the tardy disclosure" (Pet. App. D2). It noted that the prosecutor's revelation concerning Reese's prior statement was made in the course of an off-the-record conversation, which petitioners made no attempt to preserve on the record (*ibid.*). The court further observed that "no effort was made by defense counsel before the jury returned its verdict to either reopen the case, or to have the trial court declare a mistrial" (*ibid.*) The court of appeals also affirmed the district court's vacation of its sua sponte order, stating that "[t]he district court correctly comprehended its inability to grant a new trial in the absence of a motion from a defendant" (*ibid.*).

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further held that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" (*id.* at 682; *id.* at 685 (White, J., concurring)).

ARGUMENT

1. Petitioners first reassert their contention that the government violated the rule of *Brady* v. *Maryland*, 373 U.S. 83 (1963), by failing promptly to inform them of a government witness's prior inconsistent statement (86-1784 Pet. 7-12; 86-1785 Pet. 8-13). The court of appeals and the district court both correctly rejected that contention.

The government has an obligation to disclose evidence "that is both favorable to the accused and 'material either to guilt or punishment' " (*United States* v. *Bagley*, 473 U.S. at 674 (quoting *Brady*, 373 U.S. at 87)). The *Brady* disclosure requirement is intended to prevent the "miscarriage of justice" that might occur if a defendant were denied access to exculpatory evidence during trial (*Bagley*, 473 U.S. at 675-676). Petitioners contend that those principles were violated in this case because the government denied them access to *Brady* material until after the jury had retired to render its verdict. But the claim of a *Brady* violation here is highly dubious. As we explain below, the allegedly exculpatory evidence was, if anything, inculpatory and had only minimal impeachment value. Indeed, petitioners themselves apparently attached little significance to Reese's prior statement when they learned of it during the trial. As the court of appeals observed (Pet. App. D2), petitioners made no effort to preserve the statement in the record, to reopen the case prior to the jury's verdict, or to seek a mistrial.[3]

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[3] The courts of appeals generally agree that "[i]f previously undisclosed evidence is disclosed during trial, no *Brady* violation occurs unless the defendant has been prejudiced by

But even if the government's nondisclosure amounted to a *Brady* violation, and even if petitioners were not obligated to raise an objection prior to the jury's verdict, the supposed violation would not justify a new trial. A *Brady* violation requires reversal of an otherwise lawful conviction only if the undisclosed information is material in the sense that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States* v. *Bagley*, 473 U.S. at 682; *id.* at 685 (White, J., concurring). After reviewing the information at issue in the context of the evidence at trial, the court of appeals correctly concluded that petitioners failed to demonstrate "the materiality of, or prejudice from, the tardy disclosure" (Pet. App. D2). That largely factual determination does not warrant further review.

As we have explained, the government accused petitioners of stealing and transporting stainless steel scrap. At trial, Reese described the various shipments and made several statements suggesting, albeit ambiguously, that one shipment contained stainless steel

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the delay in disclosure." *United States* v. *Holloway*, 740 F.2d 1373, 1381 (6th Cir.), cert. denied, 469 U.S. 1021 (1984); see, *e.g.*, *United States* v. *McKinney*, 758 F.2d 1036, 1049-1050 (5th Cir. 1985); *United States* v. *Ziperstein*, 601 F.2d 281, 291 (7th Cir. 1979), cert. denied, 444 U.S. 1031 (1980). The government's disclosure of *Brady* information after the jury has retired may, in some cases, result in incurable prejudice. See *Hamric* v. *Bailey*, 386 F.2d 390 (4th Cir. 1967). But the question whether the claimed prejudice can be overcome should first be directed to the district court prior to the jury's verdict. The defendant has an obligation to raise its objection at that time, rather than to save the objection so as to preserve it for a subsequent appeal.

caps and the other shipments contained stainless steel ingot butts. Reese's lack of specificity was understandable; the actual form of the stainless steel was a technical matter of little interest to the prosecution or the defense. The supposedly exculpatory evidence —Reese's prior statement that more than one of the shipments contained caps—was likewise immaterial to the question of guilt or innocence. Indeed, the pretrial statement, if anything, was wholly consistent with the indictment and supported petitioners' guilt.[4]

Furthermore, Reese's statements had only minimal impeachment value, at best. As noted above, Reese testified at trial that one of the shipments could have included caps (6 Tr. 67). And he indicated on cross-examination that he was unsure of the exact form of the stainless steel in various shipments (*id.* at 178-193). Thus, there was little discrepancy between his trial testimony and his pretrial statement. Moreover, petitioners thoroughly challenged Reese's credibility on a number of other grounds, questioning him about his status as an immunized witness; his part in the theft of stainless steel from SMC; and other allegedly inconsistent prior statements he made concerning the weight of the scrap steel, the paperwork for the shipments, and the amount of the bribes paid to the Jones & Laughlin employees (see *id.* at 107-222). Thus, any discrepancy between Reese's trial testimony and the particular pretrial statement at issue here could

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[4] Significantly, petitioners did not seek to distinguish between ingot butts and caps at trial; instead, they defended on the ground that they had a good-faith belief that they were entitled to *all* the stainless steel pieces (1 Tr. 160, 164-165, 167, 186-187, 195-196; 11 Tr. 117, 141-144, 148-149, 158). As counsel for Gregory stated to the jury (11 Tr. 122), under the defense theory "all the counts are the same."

not have supplemented petitioners' impeachment efforts in any significant way.

Finally, the other evidence of petitioners' guilt, which included testimony from various participants in the scheme, was compelling. Given the strength of the government's case, there is no reasonable probability that, had Reese's pretrial statement been made available to petitioner earlier in the trial, the result of the proceeding would have been different. Indeed, petitioners' failure to seek a pre-verdict remedy directly undermines their present contention that the disclosure could have changed the result of the trial.[5]

2. Petitioners also contend that the district court erred in vacating its sua sponte order granting them a new trial (86-1784 Pet. 12-14; 86-1785 Pet. 13-15). The court of appeals correctly concluded that the district court acted properly in vacating that order (Pet. App. D2).

The Federal Rules of Criminal Procedure provide that the district court may grant a new trial "on motion of a defendant" (Fed. R. Crim. P. 33). The Rules "make it clear that a judge has no power to order a new trial on his own motion, that he can act only in response to a motion timely made by a defendant." Fed. R. Crim. P. 33 advisory committee note (1966 Amendment). See, *e.g.*, *United States* v. *Brown*, 587 F.2d 187, 189 (5th Cir. 1979); *United States* v.

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[5] Contrary to petitioners' suggestion, this case does not involve the solicitation of false testimony by the government. Petitioners have not shown that Reese's testimony was false, and the government took the position in the district court that Reese's sworn testimony at trial in the presence of his former employees deserved more credence than his informal, unrecorded, and unratified out-of-court statement. Government's Answer in Opposition to Defendants' Motion for New Trial at 7.

Green, 414 F.2d 1174, 1175 (D.C. Cir. 1969). Here, petitioners made a timely motion for a new trial, the district court denied it (Pet. App. A1), and petitioners did not make a motion for reconsideration following the denial. The district court's subsequent order granting a new trial (*id.* at B1-B2) was made in the absence of a defense motion and was therefore invalid. Once informed of that defect, the district court promptly vacated its order (*id.* at C1-C4), and the court of appeals properly affirmed that result (*id.* at D2). Both courts recognized that Fed. R. Crim. P. 33 unambiguously prohibits a sua sponte order granting a new trial.

Petitioners contend that the Rule 33 prohibition should not apply here because the purpose of the rule is to obviate the double jeopardy problems that would arise if trial judges could grant new trials in the absence of a defense motion (see Fed. R. Crim. P. 33 advisory committee note (1966 Amendment)) and because they clearly would have welcomed a new trial in light of their initial Rule 33 motion. But Rule 33, by its express terms, does not permit such exceptions. Rather, it was intended to serve the more general purpose of precluding unilateral judicial second-guessing of the jury's verdict. In any event, there is no clear distinction, for double jeopardy purposes, between a court's granting "reconsideration" of a new trial motion in the absence of a timely request for reconsideration and the court's granting a new trial sua sponte after previously denying a separate motion for a new trial. Acceptance of petitioner's theory would therefore create an ill-defined and unmanageable exception to a presently clear rule.[6]

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[6] Petitioners' reliance on *United States* v. *Spiegel*, 604 F.2d 961, 971 (5th Cir. 1979), cert. denied, 446 U.S. 935 (1980), is

Finally, denial of the new trial motion was clearly the correct result quite apart from the question whether the district court had jurisdiction to grant the motion in the absence of a motion by petitioner. As the court of appeals pointed out, and as we have discussed above, the pretrial statement that was withheld in this case was inconsequential, and the prosecutor's failure to disclose that statement until late in the trial could not have affected the outcome of the case. Accordingly, it would have been error for the district court to grant a new trial motion even if the district court had had jurisdiction. Any error on the part of the district court and the court of appeals with respect to the jurisdictional question therefore did not result in the denial of any relief to which petitioners were otherwise entitled.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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misplaced. There, the court of appeals held that the district judge had jurisdiction to reconsider his grant of a new trial pursuant to a timely motion for reconsideration by the government (604 F.2d at 971). Thus, *Spiegel* did not involve sua sponte action by the court.

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